IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1105

ANTHONY HERBERT,

Petitioner,

—against—

BARRY LANDO, MIKE WALLACE and CBS INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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Opinions Below

The interlocutory decision and opinions of the United States Court of Appeals for the Second Circuit are reported at 24 Fed. Rules Serv.2d 221 (2d Cir. 1977) and are set forth as Appendix A of the Petition (1a-52a). The Memorandum and Order of the United States District Court is reported at 73 F.R.D. 387 (S.D.N.Y. 1977) and is reproduced in Appendix B of the Petition (53a-89a). The Memorandum Opinion and Order of the District Court certifying its prior Memorandum and Order is unreported and is reproduced in Appendix C to the Petition (90a-98a).

Jurisdiction

The Petitioner asserts that the jurisdiction of this Court arises under 28 U.S.C. § 1254(1) (1970).

Question Presented

Whether an interlocutory ruling of the United States Court of Appeals for the Second Circuit correctly held that the First Amendment to the United States Constitution provides protection against disclosure of the editorial process of the press in pre-trial discovery conducted in a libel case governed by *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

Constitutional Provision Involved

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Statement of the Case

The case arises out of a highly publicized and extremely heated dispute between Petitioner Anthony Herbert, a former lieutenant colonel in the United States Army, and the Army itself: Herbert claims that while on duty in Viet Nam he observed and reported various war crimes to his superiors; the Army flatly—and explicitly—denies that.

On February 4, 1973, the CBS television network broadcast the program "60 MINUTES", one segment of which dealt with the Herbert-Army controversy. In this defamation action relating to that segment, Herbert has sued Respondents CBS Inc. ("CBS") and Messrs. Lando and Wallace, respectively, the individual producer of and correspondent for the segment. There has been no dispute that Herbert is a public figure or public official—or both—and that the case is therefore governed by principles set forth in *New York Times Co.* v. *Sullivan, supra,* and its progeny.

By agreement of counsel, Herbert was permitted to begin and complete discovery of defendants Lando, Wallace and CBS before the commencement of defendants' discovery of Petitioner. Herbert's discovery began with the production of thousands of pages of documents by the defendants; Herbert also attended screenings of the segment and related filmed interviews.

Herbert's deposition of Lando began on August 1, 1974 and was concluded, over a year later, subject to a ruling by the District Court on disputed areas. The deposition was exhaustive in its scope. Indeed, as summarized by Chief Judge Kaufman:

> "The sheer volume of the transcript—2903 pages and 240 exhibits—is staggering. Lando answered innumerable questions about what he knew, or had seen; whom he interviewed; intimate details of his discussions with interviewees; and the form and frequency of his communications with sources. The exhibits produced included transcripts of his interviews; volumes of reporters notes; videotapes of interviews; and a series of drafts of the '60 Minutes' telecast. Herbert also discovered the contents of pre-telecast conversasations between Lando and Wallace as well as re-

actions to documents considered by both." (footnote omitted) (Pet. 18a-19a)

The number of questions to which objections were raised and which became the subject of Petitioner's Rule 37 motion relate, in the main, to matters which did not even appear in the broadcast. They involve Lando's beliefs, opinions, intent and conclusions; they range from questions designed to elicit " 'Lando's conclusions during his research and investigation regarding people or leads to be pursued, or not to be pursued . . .' " to other questions which inquire into " 'Lando's intentions as manifested by the decision to include or exclude material' " (Pet. 57a-58a).

Illustrative questions include

—whether Lando "ever came to a conclusion" that it was unnecessary "to interview one individual" (p. 666)*;

—what "the basis" was for Lando's decision to interview one soldier three times and not to interview another soldier (p. 667);

—what "the basis" was for including in the broadcast a statement by one individual and not another regarding Herbert's treatment of Vietnamese (p. 876);

—whether Lando had "propose[d] to include in the program" certain favorable statements about Herbert (p. 877);

—and a wide variety of other questions relating to the editorial selection process by which CBS and its employees determined what to include in the "60 MINUTES" segment relating to Herbert.

* References to "p. —" are to pages of the Lando deposition, which was part of the record on appeal in this matter.

When Lando, on advice of counsel, declined to respond to these and related questions, plaintiff sought an order compelling discovery pursuant to Rule 37(a)(2), Fed.R.Civ.P.

The District Court Opinion

On January 4, 1977, the Hon. Charles S. Haight, Jr., U.S.D.J., entered a Memorandum and Order directing Respondents to respond to essentially all the disputed discovery sought by plaintiff (Pet. 53a-89a). Judge Haight's opinion concluded that given the "already heavy burden of proof" upon a public figure plaintiff in a *Sullivan*-governed libel suit, such a plaintiff was entitled to "liberal interpretation" of pre-trial discovery rules (Pet. 62a-63a).

All claims of First Amendment protection—or even the relevance of First Amendment considerations to the scope of the sought discovery—were summarily rejected by the District Court. Cases cited by CBS to demonstrate the extraordinary breadth of protection afforded the press in its editorial decision-making process* were distinguished on their facts and rejected insofar as they were urged to set forth relevant bodies of law: "these cases", the District Court concluded, "have *nothing to do* with the proper bounds of pre-trial discovery in a defamation suit alleging malicious publication." (Emphasis added) (Pet. 67a)

On February 22, 1977, having received a request from Respondents seeking certification of the decision pursuant to 28 U.S.C. § 1292(b) (1970), and an opposition thereto from Petitioner, the District Court entered a new Memorandum Opinion and Order, amending its previous decision and making the findings required by Section 1292(b) as a

* *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241 (1974) (*"Tornillo"*); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973) (*"CBS"*).

prerequisite to interlocutory appeal (Pet. 90a-98a). By order entered without opinion on March 17, 1977, the United States Court of Appeals for the Second Circuit granted the petition for leave to appeal.

The Decision of the Court of Appeals

The Court of Appeals, in opinions of Judge Kaufman and Judge Oakes, reversed the decision of the District Court; Judge Meskill dissented.

Judge Kaufman divided the questions at issue on appeal into five categories:*

"1. Lando's conclusions during his research and investigations regarding people or leads to be pursued, or not to be pursued, in connection with '60 Minutes' segment and [a subsequent magazine article by Lando];

"2. Lando's conclusions about facts imparted by interviewees and his state of mind with respect to the veracity of persons interviewed;

"3. The basis for conclusions where Lando testified that he did reach a conclusion concerning the veracity of persons, information or events;

"4. Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication; and

* Although the scores of specific discovery questions at issue were included in the record on appeal, the Court of Appeals was neither asked, nor did it choose, to deal with each specific question. Instead it limited its consideration to the categories described above, leaving for the District Court the task of evaluating whether specific questions asked of Lando fall within the editorial process privilege. *See* Pet. 46a (Opinion of Oakes, J., concurring).

"5. Lando's intentions as manifested by his decision to include or exclude certain material." (Pet. 19a-20a)

Both Judge Kaufman and Judge Oakes emphasized the important protection afforded the editorial process decisions of the press by the First Amendment, a protection each found reflected in this Court's decisions in *Tornillo* and *CBS*. Analyses of those cases, the holding of *New York Times* v. *Sullivan* itself and its progeny in this Court, and the emerging body of district and appellate court decisions dealing with procedures to be used in libel suits are set forth at length in their respective opinions. The opinions conclude that to ignore First Amendment considerations and to allow discovery of the editorial process as reflected in the five categories of questions at issue would have an impermissibly inhibiting effect on the press in the performance of its editorial functions. Accordingly, the Court of Appeals reversed the District Court's order compelling discovery as to such matters and remanded the matter to the District Court in order that the principles enunciated by the Court of Appeals might be applied to the specific questions posed in discovery.

Judge Meskill dissented. His opinion acknowledged that responses to the questions at issue would have "a 'chilling' or deterrent effect", but urged that judicial review "is supposed to" chill, since "[t]he publication of lies should be discouraged." (Pet. 46a)

ARGUMENT

It is Respondents' position that in concluding that the First Amendment afforded protection for the editorial process deliberations of the press, the Court of Appeals properly took account of the substantial First Amendment considerations at stake with respect to discovery matters

in libel suits governed by *Sullivan*. For this reason alone, Respondents believe review by this Court would be inappropriate. In any event, however, and notwithstanding the undoubted significance of the Second Circuit's decision, the interlocutory character of the present ruling, the status of the case on remand, and the absence of decisions on this matter from other district or circuit courts indicate that this case is simply not ripe for review by this Court.

I.

This Matter Is Not Ripe for Review by This Court.

The petition in this matter seeks certiorari with respect to a case which is not ripe for review under the principles customarily applied by this Court. This Court has, over the years, articulated a high degree of reluctance to consider, via certiorari, non-final decisions of Courts of Appeals. *American Construction Co.* v. *Jacksonville, T.&K. W. Ry.*, 148 U.S. 372, 384 (1893). Indeed, a lack of finality, "of itself alone furnishe[s] sufficient ground for the denial" of a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The Court has indicated that a writ of certiorari will not be issued in interlocutory matters "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co.* v. *Jacksonville, T.&K.W. Ry., supra*, 148 U.S. at 384.

Here, of course, notwithstanding the significance of the issues confronting the Court of Appeals, the only potential "embarrassment" or "inconvenience" to Petitioner in the conduct of this matter, even were the Court of Appeals' ruling to be in error, would be the possibility of a trial or dispositive motion heard with less than complete discovery. This situation is routinely encountered in applying a final judgment rule and hardly rises to a level sufficient to overcome the problem posed by piecemeal appeals.*

The difficulties inherent in most interlocutory appeals are, if anything, magnified here. The Court of Appeals framed its decision in terms of the five discrete categories of discovery requests defined by Judge Kaufman (Pet. 19a-20a). The Court of Appeals remanded the case in order that the principles of its decision be applied to specific questions which might or might not fit within those five categories or otherwise fall within the privilege described in its decision. The mere fact of a pending remand has itself been a basis for denial of certiorari. *See Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967). Review at this time would deny this Court the benefit of the results of just such a remand and the subsequent adjudications on the merits in which the effect of the privilege would become clear.

The Petition itself suggests the desirability of further proceedings if this Court is even to consider review based on Herbert's claim that the approach adopted places too great a burden on a libel plaintiff. The Petition includes eight printed pages of factual assertions (with many of which Respondents take issue)** which Herbert apparently

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* The adequacy of the material available to Petitioner to prepare for trial or a summary judgment motion was considered in the opinions below and is discussed in Part II, *infra*.

** The extended statement of facts relating to the underlying libel case seems largely irrelevant to this Petition—except insofar as it suggests the difficulty of any review at this stage of a complex litigation where neither the District Court nor the Court of Appeals has had the opportunity to review and rule upon the factual allegations set forth by Petitioner. Accordingly, we have refrained from responding to each of many factual errors.

One glaring example is illustrative of the problem of a detailed factual discussion in the absence of the sharpening which a summary judgment motion or a trial would bring. The Petition accuses the Court of Appeals of "misstatements of fact" and by way of illustration notes Judge Kaufman's reference to Lando's production

believes necessary for an understanding of the significance of the discovery sought in any review of the Court of Appeals' decision. Yet, given the interlocutory stage of the case, neither the District Court nor the Court of Appeals has considered—let alone made—any findings of fact which could guide this Court in assessing those assertions. Nor has either Court yet considered whether any genuine issues of fact exist. Any attempt by this Court to review the interlocutory ruling of the Court of Appeals in the specific context of the facts would thus be significantly handicapped.

The problem is exacerbated by the fact that the allegedly vital nature of the discovery at issue is premised on the special nature of Herbert's theory of the case: that the broadcast of statements by the participants in a controversy may give rise to a libel where one side is supposedly given more time and one or another allegation of the "other" side is omitted. In effect, Herbert argues, libel law permits the imposition of liability for the supposed

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of " 'a laudatory report which was televised on July 4, 1971 over the CBS network.' " (Pet. 9n.) "No such report exists", the Petition baldly asserts, without explanation or qualification. (*Id.*) A reading of the Petition would suggest that Judge Kaufman had invented the entire matter. In fact, a report prepared by Barry Lando *did* exist and *was* aired on CBS on July 4, 1971.

Apparently Petitioner's sole complaint is thus with the characterization of the report as "laudatory". The report consisted primarily of an interview in which Herbert described problems he had allegedly encountered with the military. In the context of a case where the alleged defamation is an alleged implicit characterization of Herbert as a liar, it seems clear that a report devoted almost entirely to his description of his views of his difficulties with those who criticized him is plainly "laudatory". More significantly for present purposes, the Petition's failure to set forth all the facts relevant to this matter is illustrative of the problem of trying to test Herbert's assertion that he has been or will be substantially handicapped in his presentation of his case in the absence of any factual findings made in the District Court and reviewed by the Court of Appeals.

violation of what appears to be an extraordinarily altered version of the FCC's "fairness doctrine". Respondents contend that this is not the law. The Courts below have not had occasion to pass on Petitioner's theory. It is extraordinary to ask this Court to review an interlocutory discovery decision premised on such an as-yet-unevaluated theory of law, let alone one of such evident dubious merit. Whatever the merits of Herbert's theory of law, the present posture of this case thus suggests the prematurity of the Petition.

The traditional process of post-judgment review is fully adequate to protect Herbert's interests here. If, as he asserts, he has a valid claim in defamation and the effective presentation of such claim is improperly frustrated by the Court of Appeals' decision, this may be raised on a petition for review after judgment if defendants prevail below; if, on the other hand, he is not limited to the extent he claims he will be or if he were to prevail, the need for review of the matters now raised by Petitioner would be eliminated. This is not one of the " 'limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims.' " *United States* v. *Nixon*, 418 U.S. 683, 691 (1974). *Compare New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Nebraska Press Ass'n* v. *Stuart*, 423 U.S. 1327, 1328-30 (1975) (Chambers Opinion of Blackmun, J.)*.

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* The present posture of this case obviously contrasts with the situation where an outstanding court order compels disclosure of information by a journalist despite a claimed First Amendment privilege. In such situation the claimed privilege is irreparably lost if review is denied, at least in the absence of collateral attack through a contempt citation and appeal therefrom. No right of constitutional dimension is lost by a denial of certiorari here and even the opportunity to pursue the discovery in question here can be remedied by this Court on a review of any final judgment, if otherwise appropriate.

Quite apart from the interlocutory nature of the case, this is an inappropriate vehicle for review of the question of the impact of the First Amendment on the protection of the editorial process in the course of discovery in a libel case. The decision of the Court of Appeals—as that of the District Court which it reversed—was the first to consider the subject. Far from there being a conflict of decisions here, there is a total absence of learning from other courts. With respect to questions of discovery—where broad supervisory power is normally afforded the trial and lower appellate courts by this tribunal—it would seem appropriate to allow a period of time for assessment and observation of the approach adopted by the Second Circuit and any approach adopted in other circuits as they come to consider the question. *See Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (Opinion of Frankfurter, J. respecting the denial of the petition for writ of certiorari). It is Respondent's submission that experience with the approach adopted by the Second Circuit will illustrate that not only is the protection afforded mandated by the First Amendment, but that that approach does afford plaintiffs an adequate opportunity to prepare and present a case for liability in a *Sullivan* context. The guidance gained from such experience would, in any event, assist this Court in assessing the desirability of any review of the issue.

II.

The Court of Appeals Correctly Applied First Amendment Principles Sanctioned by This and Other Courts in Recognizing the Need for Protection of Editorial Process Decisions in Libel Cases.

It is important to recognize what the decision below did and did not do. It did not alter or in any way purport to modify the substantive rules of libel established in *Sullivan*. Rather the Second Circuit's ruling is one of a series of decisions, albeit the first in this context, made by the district and circuit courts* to implement the new rules of liability announced by this Court in *Sullivan* and clarified over the last decade in its decisions.**

At bottom, Herbert's challenge to the decision of the Court of Appeals rests on two basic premises: that the decision of this Court in *Sullivan* resolved all questions involving the interplay of libel law and the First Amendment; and, perhaps as a corollary, that decisions of this Court, such as *Tornillo*, shed no light whatever on First Amendment concerns affecting libel suits. The Court of Appeals rejected the first premise, as have many courts

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* *See, e.g., Cervantes* v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) [discovery—confidential source]; *Washington Post Co.* v. *Keogh*, 365 F.2d 965, 967-68 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967) [summary judgment]; *Buckley* v. *New York Post Corp.*, 373 F.2d 175, 183-84 (2d Cir. 1967) [*forum non conveniens*]; *Guitar* v. *Westinghouse Electric Corp.*, 396 F.Supp. 1042 (S.D.N.Y. 1975) [summary judgment]; *cf. Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977) [pleading requirements where First Amendment rights involved].

** *Curtis Pub. Co.* v. *Butts*, 388 U.S. 130 (1967); *St. Amant* v. *Thompson*, 390 U.S. 727 (1968); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976).

before it,* and found the second to be an improperly crabbed reading of significant decisions of this Court. Respondents submit that the Court of Appeals was correct on both counts.

The specific rule of liability announced in *Sullivan* was adopted to protect "robust debate" and to avoid "dampen[ing] the vigor" "of public debate." 376 U.S. at 270, 279. But protection against ultimate liability alone cannot avoid the potentially inhibiting effect which various aspects of litigation can themselves create. This Court has itself recognized the potential burden which pre-trial discovery can pose even in a context unaffected with any First Amendment interest. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975).

In the libel field itself, the Court of Appeals for the District of Columbia Circuit has observed:

> "One of the purposes of the [*Sullivan*] principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government." *Washington Post Co.* v. *Keogh*, *supra*, 365 F.2d at 968.

In *Keogh*, summary judgment was held to be a particularly appropriate manner of dealing with groundless libel suits since the mere pendency of litigation by a public official (or public figure) may have a chilling effect.** In the

* *See* cases cited in footnote*, p. 13, *supra*.

** *See also, Guitar* v. *Westinghouse Electric Corp., supra,* 396 F.Supp. at 1053 ["summary judgment *is* the rule, and not the exception, in defamation cases" (emphasis in original)]; *Grant* v. *Esquire, Inc.*, 367 F.Supp. 876, 881 (S.D.N.Y. 1973) [public figure plaintiff must "make a far more persuasive showing than required of an ordinary litigant in order to defeat a defense motion for summary judgment."]

present case the Court of Appeals for the Second Circuit has recognized that intrusive pre-trial discovery into the editorial process may well have a similar chilling impact, quite without regard to the merits of the underlying claim.

The significance of the press' interest in protection of its editorial process has been recognized by this Court in cases as diverse as *Tornillo* and *CBS*. The District Court found, and Herbert has consistently argued, that such cases had "nothing to do" with the proper bounds of libel discovery or, as Petitioner contends, with libel cases generally. It was not our contention below, and it is not our contention here, that those cases in any way alter principles of liability in libel cases. Rather, we do contend that *Tornillo* and *CBS* articulate sweeping First Amendment protection for editorial process decisions of the press and thus surely bear upon whether compelled disclosure of just those decisions may be countenanced.

The Petition wrongly asserts that the decision below interpreted *Tornillo* and *CBS* as holding that the *exercise* of editorial judgment was immune from post-publication scrutiny (Pet. 16). Having erected this strawman,* the

* The Petition seeks to erect a similar strawman in inferring (Pet. 13-14) that Judge Kaufman read this Court's opinion in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), as creating an absolute privilege against disclosure of a confidential source. Judge Kaufman's opinion, of course, does not so hold. It relies on *Branzburg* primarily for its recognition that newsgathering, like the processes of dissemination and editorial production he elsewhere discusses, is entitled to a significant degree of First Amendment protection. *See* opinion at Pet. 8a. As to this, there was no dispute in *Branzburg, see* 408 U.S. at 681; and, in agreement on this point, *see* 408 U.S. at 728 (Stewart, J., dissenting). Judge Kaufman also refers to the privilege which has frequently been held to arise in situations not involving the question—raised by *Branzburg*—of whether a journalist must appear before a grand jury with respect to his witnessing of a crime. In other cases, generally involving civil litigation, a First Amendment privilege has often been applied to protect journalists from being required to divulge their confiden-

Petition purports to demonstrate that even after these decisions, the press may be subject to judgment for libel. Neither Respondents nor the Court below in any way dispute this point. Rather, it is our contention, and the Court below held, that these decisions reflect a concern for the protection of the editorial process and an intention to shield it against governmental intrusion; the product of that process—the allegedly defamatory publication—remains a subject for liability, and a variety of means of proof exists to establish the actual malice required by *Sullivan* without resort to the compelled disclosure of the editorial process itself.

In the present case, for example, Herbert already has been provided with an enormous—"staggering", in Judge Kaufman's language (Pet. 19a)—amount of material and information. If there were actual malice here, surely these materials of this scope and nature* should reflect an objective manifestation of the actual knowledge of falsity or reckless disregard for the truth. In that respect, it has been recognized, in contexts far removed from any discussion of the editorial privilege, that notwithstanding the sub-

tial sources. *See, e.g., Cervantes* v. *Time, Inc., supra; Baker* v. *F&F Investment,* 470 F.2d 778 (2d Cir. 1972), *cert. denied,* 411 U.S. 966 (1973); *see generally* Goodale, *Branzburg* v. *Hayes and the Developing Qualified Privilege,* 26 Hastings L.J. 709 (1975).

* "Lando answered innumerable questions about what he knew, or had seen; whom he interviewed; intimate details of his discussions with interviewees; and the form and frequency of his communications with sources. The exhibits produced included transcripts of his interviews; volumes of reporters notes; videotapes of interviews; and a series of drafts of the '60 Minutes' telecast. Herbert also discovered the contents of pre-telecast conversations between Lando and Wallace as well as reactions to documents considered by both. In fact, our close examination of the twenty-six volumes of Lando's testimony reveals a degree of helpfulness and cooperation between the parties and counsel that is to be commended in a day when procedural skirmishing is the norm." (footnote omitted) (Pet. 19a) (Opinion of Kaufman, C.J.)

jective nature of the actual malice test, such state of mind "is ordinarily inferred from *objective facts*", *Washington Post Co.* v. *Keogh, supra,* 365 F.2d at 967-68 (emphasis added), and this is true in the vast majority of cases where "state of mind" is relevant, including the great bulk of criminal cases where the Fifth Amendment stands as a barrier to direct inquiry.*

There is simply no reason to believe that those libel plaintiffs who would have been able to demonstrate actual malice in the past will be prevented from doing so under the approach adopted by the Court of Appeals; on the other hand, the unacceptable threat to robust debate which intrusive discovery into the editorial process creates will be avoided by that approach.

* The Petition makes much of the alleged choice the press will have in shaping the evidence on state of mind at trial (Pet. 19). Obviously the objective evidence of what information was possessed, who was spoken to, what was said and what was published is of the greatest import. That evidence and more has all been supplied in this case and there is no issue concerning it.

To the extent Herbert's objection focuses on the ability of journalists to testify as to their state of mind after invoking the privilege to limit discovery, this is a matter not addressed by the decision. It is precisely the type of question which properly ought to be considered by the courts below as they work out rules defining and governing the privilege.

Similarly, the Petition's claim (Pet. 21-23) as to the uncertainties created by the rule, apart from being enormously overstated, simply reflects the desirability for trial and circuit court consideration of the issues which frequently attend a decision in a case of first impression.

CONCLUSION

The petition for a writ of certiorari should be denied.

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